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SUPREME COURT, U.S.
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No. 981670 APR 12 1999

In the Supreme Court of the United States

October Term, 1998

Elisa Lozano, etc., et al.,
Petitioners,
vs.
Toyota Motor Corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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9698

Do the constitutional rights of a party and of a prospective juror require that a trial court be authorized to disallow a race-based peremptory jury challenge?

In Batson v. Kentucky, 476 U.S. 79 (1986), this court prohibited race-based peremptory challenges, but left for another day a decision on whether to remedy such challenges by simply permitting their denial or, instead, by authorizing the striking of the entire jury venire. Page 99, fn. 24.

In People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 Pac. 2d 748 (1978), the California Supreme Court prohibited racially discriminatory peremptory challenges, and made dismissal of the entire venire the sole remedy. The Wheeler court observed that if experience should prove that quashing the entire venire is "ineffective to deter...abuses..., it will be time enough then to consider alternative penalties." Page 282, fn. 29.

Wheeler has become an anachronism, followed by virtually no other courts, because it violates the constitutional right of fit jurors to sit. Further, it encourages the use of discriminatory challenges to force an opponent to disqualify an otherwise favorable venire.

PARTIES

Petitioners in this court, and plaintiffs below, hereinafter referred to as the Lozanos, are:

Elisa Lozano, a minor, by and through her guardian ad litem, Effrain Landeros;

The Estate of Miguel Lozano, by and through its administrator, Effrain Landeros;

Ricky Lozano, a minor, by and through his guardian ad litem, Effrain Landeros;

and Enrique Lozano.

Respondents in this court, and defendants below, hereinafter referred to as Toyota, are:

Toyota Motor Corporation;

Toyota Motor Sales, U.S.A., Inc.; and

Toyota of Sacramento.

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JURISDICTION

The Lozanos petition for writ of certiorari to the California Court of Appeal, Third Appellate District. That court's opinion, filed on October 1, 1998, is attached as Appendix B. The California Supreme Court denied a hearing on January 13, 1999. Its order of denial is attached as Appendix C.

Jurisdiction arises under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

This case concerns the equal protection clause in the first section of the 14th Amendment to the Constitution of the United States of America. That clause provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Enrique Lozano watched his young children, Miguel and Elisa, burn alive in a gasoline fire in the family's 1988 Toyota van. The van drifted off a highway at freeway speed and sideswiped a concrete safety barrier on the side of the road. The van leaked gasoline and erupted in flames. Miguel burned to death, and Elisa survived with burns over 75% of her body. The Lozano family sued Toyota for strict liability, negligence and breach of implied warranty because the van's fuel system was not crashworthy.

During jury selection, but outside the presence of the jury, Toyota exercised four of its five peremptory challenges to exclude hispanic and black jurors. The Lozanos, who are hispanic, objected.[1] The irritated trial judge thereupon offered to strike the entire venire.[2]

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[1] RT 1536-1537, 1540, 1598, 1599. ("RT" refers to the Reporter's Transcript, the cited portions of which are in Appendix E.)

[2] RT 1610:10-20 (Because this section constitutes the ruling of the trial court which is here in issue, it appears in both Appendix A and Appendix E):

> MR. M. PADWAY [Plaintiff's attorney]: The California rule

appears to be that the only remedy that the court has is to call a new panel. The --

THE COURT: Which I offered to do. Let the record speak to that.

MR. M. PADWAY: I was afraid of that. The federal courts allow a particular challenge to be denied. I -- I don't see that -- unless your Honor is interested in changing California law -- that -- that you have that option.

THE COURT: I -- I'm not prepared.

The court reiterated its readiness to follow the California procedure of striking the entire venire at RT 1613:8-9:

THE COURT: I'm prepared to, you know, dismiss these people and call in a new panel.

Under California law, a party who objects to the other party's use of peremptory challenges on the ground of race-based discrimination must satisfy the court that he has established a prima facie case thereof. People v. Fuentes, 54 Cal.3d 707, 715, 286 Cal. Rptr. 792, 818 Pac. 2d 75 (1991). However, when the court inquires about the justification for those challenges, "the court has made 'at least an

The Lozanos responded by acknowledging to the court that it had no authority merely to deny the discriminatory challenges because it was limited to the remedy authorized in Wheeler. The trial court replied that it was "not prepared" to "change California law" on the subject.

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implied finding' of a prima facie showing." Id., at 716; People v. Sims, 5 Cal. 4th 405, 428, 20 Cal. Rptr. 2d 537, 853 Pac. 2d 992 (1993). The court then must determine whether or not the other party's justifications suffice. If they do not, the court then "must dismiss the jurors thus far selected," and draw a different venire. People v. Wheeler, 22 Cal. 3d 258, 282, 148 Cal. Rptr. 890, 583 Pac. 2d 748 (1978).

Here, of course, the court went much further than merely inquiring about Toyota's justifications. Thus, the court actually offered to grant the mistrial and start over with a new venire. And Toyota's counsel not only raised no objection, but acquiesced in the decision, thereby conceding the issue. RT:1612:28-1613:4:

> MR. LAZARUS [Toyota's attorney]: Then, your Honor, let me-...
>
> MR. LAZARUS: -make it clear that our position would be that he's got the opportunity to cure any problem right now by getting a new panel in here...

That left the Lozanos with two options. They could accept the court's offer, thereby giving the well-financed defendant the opportunity to scuttle venire after venire until, by chance, it obtained one to its liking.[3] Or, the Lozanos could try the case before a racially skewed jury. Either option would reward Toyota for its racially discriminatory conduct.

Those jurors who were entirely fit to serve -- but whom Toyota had rejected because of their race -- had no option. They lost their right to sit as jurors -- a right this court has described as being, except for voting, "their most significant opportunity to participate in the democratic process." Powers v. Ohio, 499 U.S. 400, 407 (1991).

The Lozanos declined the offered new venire, and the racially skewed jury returned a verdict in favor of Toyota. The Court of Appeal affirmed in an unpublished opinion. Appendix B. Citing another appellate decision, it held that "'until the United States Supreme Court mandates a contrary remedy, or the California Supreme Court changes its mind, we

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[3] The Wheeler rule also leads to multiple mistrials when counsel refuses to desist from exercising racially discriminatory challenges. People v. Williams, 26 Cal. App. 4th Supp. 1, 31 Cal. Rptr. 2d 769 (1994).

have no option but to follow the Wheeler remedy.'" Appendix B, page 7.

The California Supreme Court denied the Lozanos' petition for a hearing without comment, Justice Mosk dissenting. Twenty years earlier, Justice Mosk had authored that court's opinion in Wheeler, supra.

ARGUMENT

In Strauder v. West Virginia, 100 U.S. 303 (1880), this court reversed a state court conviction because blacks had been deliberately excluded from the grand jury which issued the indictment. In Vasquez v. Hillery, 474 U.S. 254 (1986), Justice Marshall quoted from Rose v. Mitchell, 443 U.S. 545 (1979), as follows (p. 264):

> 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.

This court began its fight against racial discrimination in the selection of jurors in Strauder, supra, and has continued it

unrelentingly.[4] In Powers v. Ohio, 499 U.S. 400, 410-416 (1991), this court held that a litigant may assert the right to sit of the fit juror who falls victim to a race-based challenge. And in Edmonson v. Leesville Concrete Company, 500 U.S. 614 (1991) this court extended the prohibition of race-based peremptory challenges to civil cases. Since the California decision in Wheeler in 1978, courts have experimented for more than two decades with different remedies for race-based challenges.

This court's historic role in eradicating racial discrimination from jury selection, coupled with the experiences of lower courts in utilizing unsatisfactory remedies and the growing recognition of the right of fit jurors to serve, all combine

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[4] Neal v. Delaware, 103 U.S. 370 (1880); Norris v. Alabama, 294 U.S. 587 (1935); Hollins v. Oklahoma, 295 U.S. 394 (1935) (per curiam); Pierre v. Louisiana, 306 U.S. 354 (1939); Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954); Whitus v.Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967) (per curiam); Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Castaneda v. Partida, 430 U.S. 482 (1977); Rose v. Mitchell, 443 U.S. 545 (1979); Vasquez v. Hillery, 474 U.S. 254 (1986); Batson v. Kentucky, 476 U. S. 79 (1986).

to make this case appropriate for hearing.

This court explained the basis for the constitutional requirement that fit jurors be allowed to serve in Powers v. Ohio (1991) 499 U.S. 404, at 406-407:

> "In Batson, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in Batson to that one aspect of the harm caused by the violation. Batson "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors. Allen v. Hardy, 478 U.S. 255, 259 (1986) (per curiam) (quoting Brown v. Louisiana, 447 U.S. 323, 329 (1980)). Batson recognized that a prosecutor's discriminatory use of peremptory challenges **harms the excluded jurors and the community at large**. 476 U.S., at 87.

* * *

In Balzac v. Porto Rico, 258 U.S. 298 (1922), Chief Justice Taft wrote for the Court:

> "The jury system postulates a conscious duty of participation in the machinery of justice... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." Id., at 310.

* * *

While States may prescribe relevant qualifications for their jurors [citation], a member of the community may not be excluded from jury service on account of his or her race. "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and

withholding of the elective franchise." Carter, supra [Carter v. Jury Comm'n of Green County, 396 U.S. 320 (1970)], at 330. Over a century ago, we recognized that:

> "The very fact that [members of a particular race] are singled out and expressly denied...all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." Strauder, supra [Strauder v. West Virginia, 100 U.S. 303 (1879)] at 308. [Emphasis added.]

Despite this unanimous and strident denunciation of race-based peremptory challenges, the remedy varies widely from jurisdiction to jurisdiction, and in those few jurisdictions which follow Wheeler, the courts simply ignore the right of fit jurors to sit. The court in Jones v. State of Maryland, 105 Md. App. 257, 270, 659 A. 2d 361, 367 (1995) affd. 343 Md. 584, 586, 683 A. 2d 520, 521 (1996) noted:

> The issue of what action should be taken by a trial court when a Batson violation has occurred is one of first impression in this State. The Supreme Court has provided us with no guidance in this regard. Indeed, the Court acknowledged in Batson that it was leaving this issue for another day:
>
> > In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in

> a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.
>
> 476 U.S. at 99, n.24 ...(citations omitted).

Courts originally diverged widely on the enforcement of this constitutional right. However, a growing consensus allows a court to balance the right to a fair trial against the right of fit jurors to serve and, depending upon the circumstances, either to disallow the race-based challenge or to strike the entire venire.[5] These courts consider

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[5] State v. Franklin, 456 S.E.2d 357, 360 (S.C. 1995) cert. denied, 516 U.S. 856 (1995); Ezell v. State, 909 P.2d 68, 72 (Okla. Crim. App. 1995); Commonwealth v. Fruchtman, 418 Mass. 8, 633 N.E.2d 369, 373 (Mass. 1994), cert. denied, 516 U. S. 856 (1995); Haschke v. Uniflow Manufacturing

whether or not the jurors were present when the challenges were made, whether the motion was made early or late in the selection process, and other factors. Other courts simply deny the peremptory challenge.[6] Those courts protect the

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Co., 268 Ill. App. 3d 1045, 645 N.E.2d 392, 396, 206 Ill. Dec. 387 (Ill. App. 1994); Friedman v. State, 654 So. 2d 50, 52 (Ala.Crim.App. 1994), cert. denied, No. 1940189 (Ala. 1995);Koo v. State, 640 N.E.2d 95, 100 (Ind.App. 1994); State ex rel. Curry v. Bowman, 885 S.W.2d 421, 425 (Tex.Crim.App. 1993), cert. denied, 513 U.S. 866 (1994); Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992); People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279, 281 (S. Ct. App. Div. 1990); State v. Walker, 154 Wis. 2d 158, 453 N.W.2d 127, 135 n.12 (Wis. 1990) cert. denied 498 U.S.962 (1990); U.S. v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987); Sims v. State, 768 S. W. 2d 863, 864 (Tex. App. 1989 (pet. dismissed, 792 S. W. 2d 81 (Tex. Crim. App. 1990); Jones v. State, 105 Md. App. 257, 659 A. 2d 361 (1995)

[6]State courts so holding include: Ellerbee v. State, 215 Ga. App. 312, 316-317, 450 S.E.2d 443, 448 (Ga. App. 1994); Conerly v. State, 544 So. 2d 1370, 1372 (Miss. 1989); State v. Grim, 854 S.W.2d 403, 416 (Mo.), cert. denied, 510 U. S. 997(1993); State v. Shelton, 871 S.W.2d 598, 600 (Mo. App. 1994).

right of fit jurors to sit. The Wheeler remedy of striking the entire venire is defective because it (1) unconstitutionally subjects the excluded jurors to discrimination [State v. Parker, 836 S.W.2d 930, 936 (Mo.), cert. denied, 506 U.S. 1014 (1992)], (2) wastes judicial resources by requiring the processing of an entirely new venire (Ibid.), (3) leads to multiple mistrials when counsel refuses to desist from exercising racially discriminatory challenges [People v. Williams, 26 Cal. App. 4th Supp. 1, 31 Cal. Rptr. 2d 769 (1994)], and (4) "allows a prosecutor to push the limit and, if found to have gone too far, to have the slate wiped clean and start over with a new venire." [People v. Smith, 21 Cal. App. 4th 342, 346 , 25 Cal. Rptr. 2d 850 (1993)].

Wheeler, once the lodestar in this field, now sits virtually alone with its per se requirement for dismissal of the entire venire in all cases.[7] And even the court in Wheeler

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Federal courts so holding include: United States v. De Gross, 960 F. 2d 1433, 1442 (9th Cir. 1992)

[7] See, State v, McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied 512 U.S. 1254 (1994) holding that the fairer approach is to dismiss the entire panel and begin jury selection anew because (p. 159):

conceded the need for further review, noting (p. 282, fn. 29):

> Additional sanctions are proposed in the literature [reference omitted], but we have no present grounds to believe that the above procedure will be ineffective to deter such abuses of the peremptory challenge. If experience should prove otherwise, it will be time enough then to

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> To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully.

Here, this concern does not exist because Toyota made its challenges outside the presence of the jury.

consider alternative penalties.

Justice Mosk, who authored Wheeler, voted to grant a hearing in the case at bar. That, of course, is another indication that the time has come to discard the Wheeler rule in favor of one which protects the rights, both of parties and of prospective jurors.

This court, historically, leads the attack on racial bias in the judicial system. Ample experience now proves that only by disallowing the race-based challenge, or at least by providing the discretion to do so, can the constitutional mandate for equal protection be validated. Only by granting this petition can this court give meaning to the right of fit jurors to serve, which right it recognized so eloquently in Powers v. Ohio, 499 U.S. 400 (1991).

Petitioners respectfully submit that the court should grant their petition now.

Dated:

_____

Ernest M. Thayer

_____

Laurence F. Padway

Attorneys for petitioners

APPENDICES TO PETITION FOR
WRIT OF CERTIORARI

A Excerpts from the Reporter's Transcript which are the ruling of the trial court

B Opinion of the Court of Appeal of California

C Order of the Court of Appeal of California Denying Rehearing

D Order of the Supreme Court of California Denying Review

E Excepts from the Reporter's Transcript at trial

APPENDIX A

EXCERPTS FROM THE

REPORTER'S TRANSCRIPT

RT 1610

THE COURT: Yeah, well --

MR. M. PADWAY: My --

THE COURT: -- that's my role here.

MR. M. PADWAY: -- my -- alright, let -- let -- I think you were using the word "enlightened" last night, so let me give you the benefit of my enlightenment.

The California rule is highly criticized in the federal courts.

THE COURT: What is the California rule?

MR. M. PADWAY: The California rule appears to be that the only remedy that the court has is to call a new panel. The --

THE COURT: Which I offered to do. Let the record speak to that.

MR. M. PADWAY: I was afraid of that. The federal courts allow a particular challenge to be denied. I -- I don't see that -- unless your Honor is interested in changing California law -- that -- that you have that option. One of the things --

THE COURT: I -- I'm not prepared.

MR. M. PADWAY: -- that the California courts point out is that once the juror's left the room, it's hard to get the jurors back.

THE COURT: That's a federal rule? To get the juror back -- I mean, to --

MR. M. PADWAY: Well, the federal --

THE COURT: -- not to excuse him.

MR. M. PADWAY: -- the federal rule is that you can simply deny that challenge. And --

RT 1611

THE COURT: Yeah, but you have to have a hearing, don't you? And that must take a length of time.

MR. M. PADWAY: I -- I -- I think that's probably the better rule, but it -- you know, at this point, I -- at this point I'm afraid to make any kind of motion, so let's just proceed.

I would advise the court also that the last point at which a motion can be made is when the

alternates have all been seated -- or -- or sworn in.

THE COURT: Well, what's the authority of that?

MR. M. PADWAY: The best source turned out to be this Civil Trials and Evidence, although I did spend a fair amount on Lexis this morning.

MR. LAZARUS: Your Honor, it's People v. Gore, 18 Cal.App 4, 692. Stands for that proposition.

THE COURT: That -- what is the proposition?

MR. LAZARUS: The proposition being that the motion is untimely if it's made after the jury is impanelled --

THE COURT: Oh.

MR. LAZARUS: -- and sworn. So that's the last --

THE COURT: Well, the --

MR. LAZARUS: -- date --

THE COURT: -- jury will be impanelled now if I proceed to have them sworn.

MR. LAZARUS: That's correct.

MR. M. PADWAY: Correct.

MR. LAZARUS: And --

RT 1612

THE COURT: See, we have a jury then, regardless of alternates.

MR. LAZARUS: -- that's right, and so our position, your Honor, is if they don't like this panel and they want to move to -- for any relief because they think that we have in any was discriminated based on our jury selection activities, now's the time to do it.

THE COURT: I would think so. Makes sense.

Well, if you're prepared -- you want me to go ahead then and swear this jury panel that we have now?

MR. M. PADWAY: I -- I don't think -- unless the court is prepared to make its own motion, I'm not going to make one.

THE COURT: No, I'm not making --

MR. M. PADWAY: So --

THE COURT: -- I'm not in the habit of making motions.

MR. M. PADWAY: -- so, yeah, I -- I -- I think at this point we proceed.

THE COURT: All right then. I'll interpret that to mean that you waive any objection; I'm going to swear the panel -- or, rather, swear the jury.

MR. M. PADWAY: Okay, I jus -- I -- in terms of waiving any objection, I just want to make it clear that I'm still investigating the possibility of filing a supplemental complaint raising this issue.

THE COURT: Yeah, I'm --

MR. LAZARUS: Then, your Honor, let me --

RT 1613

THE COURT: -- not familiar with that, but --

MR. LAZARUS: -- make it clear that our position would be that he's got the opportunity to cure any problem right now by getting a new panel in here. So, he can investigate all he wants, but our position would be --

THE COURT: Well, I'm prepared to do that, too.

MR. LAZARUS: -- it's illegal.

THE COURT: I'm prepared to, you know, dismiss all these people and call in a new panel.

It's in your court. Do you want me to --

MR. M. PADWAY: I -- I -- I'm --

THE COURT: -- proceed?

MR. M. PADWAY: -- I'm not interested in shooting myself at this point, your Honor, so let's proceed.

THE COURT: All right, then. Call in the jury. Then we'll strike the alternates. Each side gets four challenges and we'll go from there. All right.

And as soon as we get a jury and alternates, we will recess then and have them return on Monday morning at 9:30 and then we'll take up the remaining matters that we have to resolve yet. Agreeable?

MR. M. PADWAY: Sure.

THE COURT: Okay.

[9:37 a.m. The jury panel was seated.]

[Off record conversation.]

THE COURT: Good morning. All right, you may be seated. Good morning, ladies and gentlemen.

THE PROSPECTIVE JURORS [collectively]: Good morning,

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ELISA LOZANO, a Minor, etc. et al., Plaintiffs and Appellants, v. TOYOTA MOTOR CORPORATION et al., Defendants and Respondents	C025273 (Super. Ct. No. 95AS01428) FILED OCT - 1 1998 COURT OF APPEAL-THIRD DISTRICT ROBERT L. LISTON, Clerk BY _____Deputy

Enrique Lozano, Sr., individually, and Effrain Landeros as guardian ad litem for Enrique, Jr. and Elisa Lozano and as administrator of the estate of Miguel Lozano

(collectively, Lozano), appeal from a jury verdict in favor of defendants Toyota Motor Corporation, Toyota Motor Sales, USA, and Toyota of Sacramento (collectively, Toyota) in this action for strict product liability and negligence stemming from a car accident in Mexico. Lozano raises challenges based on jury selection, the granting of nonsuit on the seat belt claim, and on the trial court's refusal to submit the negligence claim after the jury found no design defect. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 1994, Enrique Lozano took his three children, Enrique, Jr., Elisa, and Miguel, on a family vacation to Mexico. As they were

returning home, their 1988 Toyota van drifted off the right side of the freeway and sideswiped a concrete barrier. The impact caused a leak in the gas tank, and a fire started before the vehicle came to a stop.

Enrique, Jr. was ejected in the crash and suffered only minor injuries. Enrique, Sr. was uninjured and attempted to free his daughter Elisa, who was burning. However, according to the father, the seat belt release did not work; the belt burned through before he could cut it off. Elisa survived, but suffered burns over 75 percent of her body, and her father burned both arms in his rescue attempts. Miguel did not survive; the expert testimony was

conflicting was to whether he died from the impact or in the fire.

The lawsuit against Toyota alleged the fuel system was not crashworthy and the steering system and seat belt were defective. The court granted a nonsuit on the seat belt claim, and the jury unanimously found no defect in the steering system. The jury found no defect in the fuel system by a 10-2 margin.

DISCUSSION

I

Peremptory Challenges

Lozano did not make a *Wheeler* motion in the trial court.[1] During jury selection, counsel for Toyota exercised peremptory challenges

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[1] *People* v. *Wheeler* (1978) 22 Cal.3d 258.

against a Black woman, two Hispanic women, and two Whites. Counsel for Lozano observed there had been three "challenge[s] of a suspect group" and "whether or not we ask for relief from the court from these obviously discriminatory challenges which are being made here, it's my . . . opinion that we have an independent cause of action for discrimination. And I . . . want to make that a matter of record."

Later in the jury selection process, the court noted, "we have a jury then." The trial judge asked counsel for Lozano if they were moving for mistrial. Counsel said no. The judge then gave counsel until the next day to decide whether to bring a *Wheeler* motion. The next

morning, counsel stated they were "afraid to make any kind of motion, so let's just proceed." The trial judge responded, "All right then. I'll interpret that to mean that you waive any objection . . ."

On appeal, despite the tactical decision declining to bring a *Wheeler* motion, Lozano raises a claim of discriminatory use of peremptory challenges. This claim is based on the assertion that California law on this issue should be changed to follow the federal rule, under which the discriminatory challenge is simply disallowed and the juror is seated. We decline Lozano's invitation. California law is settled on this issue, and dismissal of the entire venire is

the only authorized remedy. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 282; see also *People* v. *Smith* (1993) 21 Cal.App.4th 342, 346.) As noted by the Second Appellate District, "until the United States Supreme Court mandates a contrary remedy, or the California Supreme Court changes its mind, we have no option but to follow the *Wheeler* remedy." (*People* v. *Smith*, *supra*, 21 Cal.App.4th at p. 346.)

II

Nonsuit

A nonsuit is properly granted where the evidence is legally insufficient to support a judgment. (*Abrons* v. *Richfield Oil Corp.* (1961) 190 Cal.App.2d 640, 643.) Here, the trial court correctly

granted nonsuit on Lozano's claim of a design defect in the seat belt.

The Toyota van involved in this accident was originally a cargo van. Toyota of Sacramento paid another company to have the cargo van converted to a passenger van, and in this process, seat belts were added to the rear seats. Toyota kept no record as to the make or manufacturer of these added seat belts, and the actual seat belts were destroyed in the fire.

The only evidence concerning the defective nature of the seat belts was Enrique, Sr.'s testimony that the release did not work as he was attempting to extract Elisa from the burning van. However, there had been no prior problems with the seat

belt, and the seat belt was operating properly at the time Toyota sold the van to Lozano. Lozano's brief does not assert they were unable to ascertain the identity of the company which converted the van, yet they produced no evidence of the seat belt design or its flaws. Lozano's design expert testified he was unable to say to what degree the seat belt may have failed to operate properly, and another expert testified he could not form an opinion that the seat belt was defective.

An inference that a defect *could* have caused the injuries is insufficient as a matter of law. (*Endicott* v. *Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 926-928;

Casetta v. *United States Rubber Co.* (1968) 260 Cal.App.2d 792, 816.)

Lozano attempts to circumvent this problem by contending no expert testimony was required because "a product may be found defective in design if a plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (See *Barker* v. *Lull Engineering Co.* (1978) 20 Cal.3d 413, 432.) However, the operation of seat belts in emergency circumstances is not so "commonly understood" that an inference of defect arises from its performance without expert testimony. (*General Motors Corp.* v. *Superior Court*

(1996) 48 Cal.App.4th 580, 597-598.) The trial court did not err in granting nonsuit on this issue.

III

Negligence

Lozano contends the trial court erred in refusing to allow the jury to reach the negligence cause of action after finding no design defect. We disagree.

Generally, a defect must exist to support a claim for negligent design or negligent manufacturing. (See *Lunghi* v. *Clark Equipment Co.* (1984) 153 Cal.App.3d 485, 493 [where theories of liability are limited to design, a finding of no design defect bars both strict liability and negligence claims; "[plaintiffs] could not expect to

ground liability on a finding that [defendant] negligently designed a safe product"]; *DeLeon* v. *Commercial Manufacturing & Supply Co.* (1983) 148 Cal.App.3d 336, 348 [in defective design cases, "strict liability and negligence claims merge"], internal quotation marks omitted.) Thus, under general principles, once a jury has found no defect, this finding would bar Lozano's negligence claim.

Lozano notes exceptions to this general rule were recognized in *Hasson* v. *Ford Motor Co.* (1977) 19 Cal.3d 530, and *Jiminez* v. *Sears, Roebuck & Co.* (1971) 4 Cal.3d 379. However, neither of these cases applies here.

Hasson involved an independent failure to warn claim (failure to warn dealers to replace brake fluid periodically due to heat-induced vaporization with use) in addition to a design defect claim (improper design of the braking system). In such circumstances, the Court held, a jury could find a negligent failure to warn which would not require a finding of defect. (*Hasson* v. *Ford Motor Co.*, *supra*, 19 Cal.3d at p. 543.) Similarly, in *Jiminez*, the Court found an exception where (1) a jury could find a negligent failure to warn without finding a defect, and (2) instructions on res ipsa loquitur might have permitted the jury to find a non-specific defect arising from the

circumstances of the accident. (*Jiminez* v. *Sears, Roebuck & Co.*, *supra*, 4 Cal.3d at pp. 384-387.)

Here, however, Lozano presented neither a failure to warn theory, nor a res ipsa loquitur instruction, concerning the fuel system. Thus, a finding of defect was necessary to sustain either the strict liability or the negligence claims, and the jury's finding of no defect precluded both.

In the trial court, Lozano produced evidence that the location of the Toyota van's gas tank and filler pipe differed from other van manufacturers. Lozano argues evidence of industry custom is irrelevant to a determination of defect in a product liability case,

but entirely relevant to a determination of negligence.[2] Thus, he argues, the evidence of industry custom -- which the jury was instructed not to consider, but which would have been relevant to their negligence claim -- might have rendered a different result.

We disagree, for reasons which are a corollary of the negligence discussion above. A defect was a necessary predicate to a finding of negligence. If, as the jury found, there was no defect, liability could not be premised on negligently

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[2] It was at plaintiff's request, and over defendants' objection, that the trial court instructed the jury that evidence of industry custom and practice was not admitted as evidence of the product defect claim, but only as evidence on the negligence claim.

employing a design different from the industry custom when the end result was a safe product. (Cf. *Lunghi* v. *Clark Equipment Co.*, *supra*, 153 Cal.App.3d at pp. 494-495.)

We find no error.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NICHOLSON ,

We concur:

SIMS , Acting P.J.

HULL , J.

APPENDIX C

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

OCT 29 1998

COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, Clerk

BY _____ Deputy

ELISA LOZANO ETC. ET AL.
Plaintiff And Appellant

v.

TOYOTA MOTOR CORPORATION ET AL.
Defendant-Respondent

C025273
Sacramento County
No. 95AS01428

BY THE COURT:

Appellants' petition for rehearing is denied.

Dated: October 29, 1998

SIMS,

Acting P.J.

_____

cc: See Mailing List

APPENDIX D

Third Appellate District,
Division One, No. C025273
S074669
IN THE SUPREME COURT OF CALIFORNIA

ELISA LOZANO, A Minor, Etc. Et Al.,
Appellants

v.

TOYOTA MOTOR CORPORATION Et Al.,
Respondents

SUPREME COURT

FILED

JAN 13 1999

Robert Wandruff Clerk
DEPUTY

Petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

GEORGE

Chief Justice

MR. L. PADWAY: Your Honor, plaintiff will thank and excuse Mr. Bramble.

THE COURT: Let's see, Bramble -- Bram -- that's number 5?

MR. M. PADWAY: Correct.

THE COURT: Okay. Bramble, that's number 5. And that means Satterfield goes to that seat then. Right?

THE CLERK: Satterfield?

MR. M. PADWAY: Correct.

MR. L. PADWAY: Correct.

MR. M. PADWAY: Okay.

THE COURT: Isn't it Satterfield?

THE CLERK: Yes.

THE COURT: Yeah, he takes that seat.

THE CLERK: Okay.

THE COURT: All right, the challenge is with the defense.

MR. WALKER: Right. The Toyota defendants will do -- thank and excuse Mary Lopez-Garcia.

THE COURT: She'll be very happy of that.

MR. WALKER: I know that.

THE COURT: Ms. Seadence (Ph.).

MR. M. PADWAY: Your Honor, I -- I anticipate some question arising as to the appropriateness of the motivation for challenges of Hispanic jurors. And I would invite at this time a comment on the record as to the reason for that. I mean, it's up to the court when you want to get the reasons for the challenges, but I just want everyone

to know that I see a problem coming here.

MR. WALKER: Your Honor --

THE COURT: I -- I -- I don't understand what you're saying to me. You have to explain it.

MR. M. PADWAY: What I'm saying is, it's prohibitive conduct for them to exercise all their challenges on the basis of race.

THE COURT: Oh, oh, oh, oh, oh.

MR. M. PADWAY: And if they're going to start out with challenging Mrs. Lopez-Garcia, I see a problem.

MR. LAZARUS: Well, I can respond, your Honor.

THE COURT: The other side? Yeah, sure.

MR. LAZARUS: Well, your Honor, there's a -- there's a presumption

that any challenges are constitutionally permissible and the presumption is only overcome and an explanation is only required if there is shown to be a systematic exclusion of jurors on the basis of group bias. This is our first challenge. I can't see how there could possibly be a showing of any systematic exclusion at this point.

THE COURT: Well, not yet, anyway, but I suppose he's alerting your side.

MR. M. PADWAY: Exactly.

MR. WALKER: Yeah, but -- but there are a lot of Hispanic jurors --

THE COURT: Yeah.

MR. WALKER: -- and some of them we're -- we're going to let off for --

THE COURT: Okay.

MR. WALKER: -- perfectly valid reasons.

THE COURT: Well, anyway, the record will reflect your comments, and we'll go from there.

So that means that Garcia [sic] will be excused and Chernow will become number 8.

MR. WALKER: Chernow.

THE COURT: C-h -- C -- is it -- Chernow, isn't it? Yeah.

MR. WALKER: Is that number 14?

THE COURT: Pardon? Okay. Have you got that?

So now the challenge is with the plaintiff.

MR. L. PADWAY: Your Honor, the plaintiff will thank and excuse Mr. Satterfield.

THE COURT: Mr. Satterfield's out. Satterfield.

[Off record conversation.]

THE COURT: Then that means George Martin takes that chair, number 5.

All right, the challenge is now with the defense.

MR. RAMSEY: Yes. Your Honor, the defense will thank and excuse juror number 17, Teri Austin.

THE COURT: Well, you know, you can only exercise your challenge of the first -- any one of the first twelve.

MR. RAMSEY: Well, but isn't she moved --

THE COURT: And then we move them.

MR. RAMSEY: -- isn't -- isn't she now moved up --

THE COURT: No --

MR. RAMSEY: -- because we --

RT 1539

THE COURT: -- Myrna Russell.

MR. RAMSEY: What?

THE COURT: We -- we sent up Myrna Russell. There's no need to excuse her yet.

MR. WALKER: Okay, I'm sorry, we misunderstood.

THE COURT: Yeah.

[Off record conversation.]

MR. WALKER: Okay, I'm sorry, I thought they were moving to the right here. So, your Honor, can we take a second while --

THE COURT: Yeah, take your time.

MR. RAMSEY: Yes, your Honor, the defense will excuse juror number 11, Mr. Tapia.

THE COURT: Number 11, Mr. Tapia is excused by the defense, and in his place will be Myrna Russell.

MR. L. PADWAY: Your Honor, the plaintiffs will thank and excuse --

THE COURT: Wait till I write it down; hold up. Okay. Okay, now the plaintiff.

MR. P. PADWAY: The plaintiff will thank and excuse Mr. Yee.

THE COURT: Number -- what number -- oh, number 10.

MR. L. PADWAY: 10, yeah.

THE COURT: Kenneth Yee. And that means Teri Austin takes that chair.

THE CLERK: Which one, judge?

THE COURT: Isn't it Austin? Or, is --

THE CLERK: Teri Austin.

RT 1540

THE COURT: Teri Austin. And the challenge is now with the defense.

MR. WALKER: The court will thank -- or, the defense will thank and excuse Teri Austin.

THE COURT: Teri Austin is excused by the defense --

MR. M. PADWAY: If we may have a moment, your Honor.

THE COURT: -- and -- yeah, take your time -- and Luis Rico takes that chair.

[Off record conversation.]

MR. L. PADWAY: Your Honor, the plaintiffs will thank and excuse Mr. McNay.

THE COURT: What number?

MR. L. PADWAY: 3.

MR. M. PADWAY: 3.

THE COURT: 3? 3, Mr. Brown?

THE CLERK: Mr. McNay.

THE COURT: Jack Brown's number 3 now. We've already excused McNay, didn't we?

THE CLERK: No.

MR. L. PADWAY: No.

THE CLERK: No, McNay is still there, judge.

THE COURT: Okay. Huh?

THE CLERK: McNay is still number 3.

THE COURT: What did I do with Jack --

THE CLERK: Jack Brown should be number 4.

THE COURT: Oh, okay. Okay.

[Off record conversation.]

THE COURT: Is -- are we -- is that --

[Off record conversation between counsel.

MR. M. PADWAY: Your Honor, along the lines of the matter what I brought to the -- the court's attention with respect to Ms. Louise [sic] Garcia, the record should reflect that the jurors [sic] exercised a challenge again, against Ms. Austin, who is black. So they've now exercised two challenges against individuals who are in readily identifiable racial -- racial classes. And I -- I want to make that a matter of record at this point. I don't want to move for relief without an opportunity to consult with our jury consultant.

THE COURT: Well, any --

[Off record conversation between counsel.]

THE COURT: -- there's nothing before me on that right now. Any comment? Anything in the record about the -- the two --

MR. LAZARUS: If -- if we have to respond at the appropriate time, we'll go ahead and do so.

THE COURT: Okay. All right.

MR. WALKER: Yeah, I also don't want to be intimidated in not doing what I think's best. So --

THE COURT: Well, don't be then.

MR. WALKER: I won't.

THE COURT: All right.

MR. WALKER: Thank you.

MR. LAZARUS: Your Honor, one other item -- clarification. On our list we saw that there was a juror

named Steven Robertson, who, from -- from -- from where I sit it looks like he might have been passed over somehow. He should have been number 30.

RT 1599

THE COURT: On the list you mean?

MR. LAZARUS: He should have been juror number 30.

THE CLERK: He was ill, judge.

THE COURT: Oh, oh, oh, oh, oh. He was here today -- this morning -- and I received a note from Vivian, the attendant, that he'd been throwing up outside, and he -- and he was very ill and he had to go to Kaiser as soon as possible, and he was waiting in the hall.

She came in and gave me his note, so I told her to release him.

MR. LAZARUS: Okay, that clears that up.

THE COURT: Okay.

MR. RAMSEY: Then, your Honor, are we going to let Ms. Burkholder go then?

THE COURT: I'm going to let -- yes, I'm going to let Madge Burkholder go. So let's go ahead with our challenges, then I'll call them all in.

The next challenge is with the defense.

MR. RAMSEY: Yes, your Honor, the defense will thank and excuse juror number 9, Helen Garcia.

THE COURT: Okay, Helen Garcia is released. Charged to the defense, and Terry Bard will move into that chair.

Okay, challenge is with the plaintiff.

MR. M. PADWAY: Before we make our challenge, your Honor, I would like the record to reflect that that's the third challenge of a suspect group, and I would like to say

counting is correct, each side has used five?

THE COURT: Correct.

[Off the record.]

THE MONITOR: Back on the record? I have the --

THE COURT: Back on the record. Repeat that, will you, please. Back on the record.

MR. WALKER: Okay. Yes, the defendants will pass, your Honor.

THE COURT: That means we have a jury then, doesn't it?

MR. WALKER: Yes, sir.

THE COURT: Before we bring them back in, with reference to calling to the court's attention the discriminatory exclusion, what does that lead to now? Do you make a motion for a mistrial?

MR. M. PADWAY: I would want to --

THE COURT: I don't want to waste an entire ten weeks.

MR. M. PADWAY: You know, I've never had anyone do that before, to be honest with the court.

THE COURT: I haven't either.

MR. M. PADWAY: And I'm a little bit lost. To the extent that -- that I've looked at it, the -- and I -- to be blunt with the court, I feel like I'm entitled to make the motion and win it at this point. But, I -- as -- at least as I read Civil Trials and Evidence, the remedy is that you start over with a new panel, which I have no interest in whatsoever.

THE COURT: Right, I -- that would have to be it. That's why I'm bringing it to your attention, because I don't want to have you --

MR. M. PADWAY: And I just want to make sure that that -- that's the only remedy other than a possible lawsuit later on. So --

THE COURT: I'm not familiar with that area.

MR. M. PADWAY: You -- you've been awful patient with us, which is greatly appreciated --

THE COURT: Which is very --

MR. M. PADWAY: -- and I guess --

THE COURT: -- unusual, by the way.

MR. M. PADWAY: Hmm? And I guess I'll just have to ask -- I -- I'm not making a motion at this time.

THE COURT: Do you want me impanel -- swear the jurors then to serve -- the 12?

MR. WALKER: I -- I think under the case, and Alan -- unfortunately, had to leave -- knows this better than I, but my understanding is if they want to raise that issue, they happen to raise the issue, the court has to make a finding that there was some sort of discriminatory plan here and we didn't have a legitimate reason to -- to excuse people.

And, you do. You -- you could declare a mistrial and you get a brand-new panel to start over.

THE COURT: I would think so.

MR. WALKER: And so if the jury -- the ball's in their court, if

they want to make the motion and ask for that.

RT 1604

MR. M. PADWAY: I -- I -- with the irrelevant ex -- exception that I -- once you've got the discriminatory showing, the burden shifts to them to show that it was nondiscriminatory. And there -- there was a recent case on that which said that even if they didn't like the way someone answered a question, that's --

THE COURT: Here's what I suggest.

MR. M. PADWAY: -- but --

THE COURT: Rather my swear the jury now, it's -- it's 4 -- 4:35, is that we recess until tomorrow, have all the jurors return -- they're

going to have to return anyway if we continue, to pick the alternates --

MR. WALKER: Right.

MR. M. PADWAY: Okay.

THE COURT: -- and, in the meantime during the evening hours, you people can examine that area of the law and then inform the court in the morning.

MR. WALKER: Sure.

MR. M. PADWAY: Thank you once again, your Honor.

MR. WALKER: But -- but those that we've challenged probably wouldn't --

THE COURT: Oh, I'm --

MR. M. PADWAY: Oh, yeah.

THE COURT: -- yeah, I'm going to excuse those people you've challenged.

MR. M. PADWAY: Sure.

MR. L. PADWAY: Your Honor, for tomorrow's schedule, if we need to pick the alternates and there were some issues I think that needed to be sorted out before the openings --

RT 1605

THE COURT: Well, you won't open tomorrow. We have a lot of things to develop.

MR. L. PADWAY: So, openings will be Monday?

THE COURT: On Monday.

MR. RAMSEY: Okay, that makes it easier.

THE COURT: I assume you want that?

MR. RAMSEY: Yeah, we -- we were going to --

THE COURT: Yeah.

MR. RAMSEY: -- ask that, too, your Honor. We -- I got -- we got --

THE COURT: No, no. We -- no, we've got too many things to resolve yet.

MR. RAMSEY: All right.

THE COURT: All right, then, that's what we'll do. Bring the panel back.

[4:35 p.m. The panel was seated in the courtroom.]

[Off record conversation.]

THE COURT: All right, the jury has returned; all the parties are present.

The following jurors are excused. Jack Brown, you -- it's too late to return to the Jury Commissioner's Office. Is he -- can

he be excused now, or does he have to return tomorrow?

THE COURT ATTENDANT: He can come back in the morning.

RT 1606

THE COURT: Tomorrow?

THE COURT ATTENDANT: Uhm-hmm. He can go down and see if it's open. I think they still are.

THE COURT: Maybe he can still get in there.

THE COURT ATTENDANT: Yeah.

THE COURT: Thank you for being here.

Leon Sims, you're excused. You must return also to the jury, so thank you for being here.

[Off record conversation.]

THE COURT: Helen Garcia, you're excused; you must return to the jury

assembly room. Thank you for being here.

PROSPECTIVE JUROR GARCIA: Thank you.

THE COURT: Have a nice evening.

All right, Charles Weaver, you take seat number 4. Teri Bard, you take seat number 9. That vacant seat, it's the only one there.

Madge Burkholder, you are excused because of the condition you brought to my attention.

PROSPECTIVE JUROR BURKHOLDER: Thank you.

THE COURT: Okay, have a nice evening. You don't have to return. Forget about the Jury Commissioner, we'll have -- I'll cause to have you excused.

PROSPECTIVE JUROR BURKHOLDER: Okay, thank you.

THE COURT: You're welcome.

All right, ladies and gentlemen, we're going to resume this proceeding tomorrow morning at 9:30, and you are to return at that time and take the seat where you are sitting -- the same seat -- and the proceeding will continue at that time. We've been doing certain things that I can't discuss with you right now.

RT 1607

In any event, you're to report back tomorrow at 9:30. Do not discuss the case with anyone; don't form any opinions on it. You don't really know what any of the evidence is yet. And we'll see you tomorrow morning at 9:30. Have a nice

evening. That includes everybody; all the jurors in the audience.

[4:34 p.m. The panel is excused from the courtroom, and the following proceedings are held outside the presence of the prospective jurors.]

THE COURT: All right, the entire panel is absent now. Then you gentlemen will research that area of the law this evening, and return with some enlightenment tomorrow morning.

MR. LAZARUS: What's the issue --

MR. M. PADWAY: I'll --

MR. LAZARUS: -- your Honor?

MR. M. PADWAY: -- I'll consider enlightenment to be my silence, your Honor.

THE COURT: Okay. Well, the issue being whether or not they're compelled and required to make some kind of a motion at this time for a mistrial, or do they waive any objection they might otherwise have for their accusation against your side for using some form or kind of discriminatory rejection of jurors, based upon race -- color, or otherwise.

RT 1608

MR. LAZARUS: Okay.

THE COURT: That's all I know about. All right, tomorrow morning.

MR. RAMSEY: Thank you, your Honor.

MR. WALKER: Thank you.

THE COURT: 9:30.

MR. M. PADWAY: Thank you, your Honor.

[4:40 p.m. The matter stands in recess until May 31, 1996, at 9:30 a.m.]

-o0o-

FRIDAY, MAY 31, 1996

-o0o-

[Counsel and parties are present. The following proceedings were held outside the presence of the jury.]

THE COURT: All right, recalling the matter of Lozano versus Toyota. Ready for the plaintiff?

MR. M. PADWAY: We are.

THE COURT: Ready for the defense?

MR. WALKER: We are, your Honor.

MR. RAMSEY: Yes, your Honor.

THE COURT: All right. The record will reflect all parties are present and that the jury panel is waiting outside to be called in.

Have you gentlemen given any further thought to our discussion late yesterday afternoon?

MR. M. RAMSEY: Yes, I have, your Honor, and at -- at this time, let's just proceed.

THE COURT: Does that mean you're waiving any objection you have then?

MR. M. PADWAY: Uhm --

THE COURT: Well, I -- you know, I --

MR. M. PADWAY: -- that's a harsh way of putting it.

THE COURT: -- I'm not going to waste 10 weeks; let me tell you that.

MR. M. PADWAY: Uhm --

THE COURT: I -- you know, I might entertain a motion for a

mistrial, see. I'm going to put you on the spot.

MR. M. PADWAY: Well, I'm afraid of that, your Honor.

RT 1610

THE COURT: Yeah, well --

MR. M. PADWAY: My --

THE COURT: -- that's my role here.

MR. M. PADWAY: -- my -- alright, let -- let -- I think you were using the word "enlightenment" last night, so let me give you the benefit of my enlightenment.

The California rule is highly criticized in the federal courts.

THE COURT: What is the California rule?

MR. M. PADWAY: The California rule appears to be that the only

remedy that the court has is to call a new panel. The --

THE COURT: Which I offered to do. Let the record speak to that.

MR. M. PADWAY: I was afraid of that. The federal courts allow a particular challenge to be denied. I -- I don't see that -- unless your Honor is interested in changing California law -- that -- that you have that option. One of the things --

THE COURT: I -- I'm not prepared.

MR. M. PADWAY: -- that the California courts point out is that once the juror's left the room, it's hard to get the jurors back.

THE COURT: That's a federal rule? To get the juror back -- I mean, to --

MR. M. PADWAY: Well, the federal --

THE COURT: -- not to excuse him.

MR. M. PADWAY: -- the federal rule is that you can simply deny that challenge. And -- RT 1611

THE COURT: Yeah, but you have to have a hearing, don't you? And that must take a length of time.

MR. M. PADWAY: I -- I -- I think that's probably the better rule, but it -- you know, at this point, I -- at this point I'm afraid to make any kind of motion, so let's just proceed.

I would advise the court also that the last point at which a motion can be made is when the alternates have all been seated -- or -- or sworn in.

THE COURT: Well, what's the authority of that?

MR. M. PADWAY: The best source turned out to be this Civil Trials and Evidence, although I did spend a fair amount on Lexis this morning.

MR. LAZARUS: Your Honor, it's People v. Gore, 18 Cal.App 4, 692. Stands for that proposition.

THE COURT: That - what is the proposition?

MR. LAZARUS: The proposition being that the motion is untimely if it's made after the jury is impanelled --

THE COURT: Oh.

MR. LAZARUS: -- and sworn. So that's the last --

THE COURT: Well, the --

MR. LAZARUS: -- date --

THE COURT: -- jury will be impanelled now if I proceed to have them sworn.

MR. LAZARUS: That's correct.

MR. M. PADWAY: Correct.

MR. LAZARUS: And --

RT 1612

THE COURT: See, we have a jury then, regardless of alternates.

MR. LAZARUS: -- that's right, and so our position, your Honor, is if they don't like this panel and they want to move to -- for any relief because they think that we have in any way discriminated based

on our jury selection activities, now's the time to do it.

THE COURT: I would think so. Makes sense.

Well, if you're prepared -- you want me to go ahead then and swear this jury panel that we have now?

MR. M. PADWAY: I -- I don't think -- unless the court is prepared to make its own motion, I'm not going to make one.

THE COURT: No, I'm not making --

MR. M. PADWAY: So --

THE COURT: -- I'm not in the habit or making motions.

MR. M. PADWAY: -- so, yeah, I -- I -- I think at this point we proceed.

THE COURT: All right then. I'll interpret that to mean that you

waive any objection; I'm not going to swear the panel -- or, rather, swear the jury.

MR. M. PADWAY: Okay, I jus -- I -- in terms of waiving any objection, I just want to make it clear that I'm still investigating the possibility of filing a supplemental complaint raising this issue.

THE COURT: Yeah, I'm --

MR. LAZARUS: Then, your Honor, let me --

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THE COURT: -- not familiar with that, but --

MR. LAZARUS: -- make it clear that our position would be that he's got the opportunity to cure any problem right now by getting a new panel in here. So, he can

investigate all he wants, but our position would be --

THE COURT: Well, I'm prepared to do that, too.

MR. LAZARUS: -- it's illegal.

THE COURT: I'm prepared to, you know, dismiss all these people and call in a new panel.

It's in your court. Do you want me to --

MR. M. PADWAY: I -- I -- I'm --

THE COURT: -- proceed?

MR. M. PADWAY: -- I'm not interested in shooting myself at this point, your Honor, so let's proceed.

THE COURT: All right, then. Call in the jury. Then we'll strike the alternates. Each side gets four

challenges and we'll go from there. All right.

And as soon as we get a jury and alternates, we will recess then and have them return on Monday morning at 9:30 and then we'll take up the remaining matters that we have to resolve yet. Agreeable?

MR. M. PADWAY: Sure.

THE COURT: Okay.

[9:37 a.m. The jury panel was seated.]

[Off record conversation.]

THE COURT: Good morning. All right, you may be seated. Good morning, ladies and gentlemen.

THE PROSPECTIVE JURORS [collectively]: Good morning,

indicated they wanted to have a hearing on the record regarding the exercise of that peremptory challenge as to Mr. Gomez.

And we have, of course, Mr. Sanchez coming up that we obviously will have to interview further.

Do you want to be heard on your motion?

MR. M. PADWAY: Yes, I do.

MR. WALKER: Your Honor, I think you misspoke; you said the defense asked for a hearing. I think the plaintiff asked for the hearing.

THE COURT: All right.

MR. WALKER: Just so the record's --

THE COURT: Okay.

MR. M. PADWAY: Your Honor, I think at this point what we're

seeing is fairly blatant discrimination, both on the basis of individuals having Spanish surnames, and on the basis of race. I don't think there's much doubt in anyone's mind that that's going on, and it's really being flaunted.

I don't want to make a motion which would in any way result in a difference in the composition of the jury panel. In other words, I don't want to make any motion which would have as a possible result the calling of a new jury because I don't think that the defense should benefit further by reason of having done this.

But, I would like a date for a hearing re contempt because of these acts of discrimination are both

federal and state crimes. They show gross disrespect for the court